

S. 96 Amdt.

AMENDMENT NO. 267

CAL. NO.

Purpose: To regulate interstate commerce by making provision for dealing with losses arising from Year 2000 Problem-related failures that may disrupt communications, intermodal transportation, and other matters affecting interstate commerce.

IN THE SENATE OF THE UNITED STATES\_ 106 th Cong., 1 st Sess.

S. 96, 106 th Congress, 1 st Session

April 27, 1999

Ordered to lie on the table and to be printed

Intended to be proposed by Mr. McCain (for himself, Mr. Wyden , Mr. Gorton , Mr. Abraham, Mr. Lott, Mr. Frist , and Mr. Burns )

Viz: Strike out all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; TABLE OF SECTIONS.

(a) Short Title.\_ This Act may be cited as the ``Y2K Act".

(b) Table of Sections.\_ The table of sections for this Act is as follows:

Sec. 1. Short title; table of sections.

Sec. 2. Findings and purposes.

Sec. 3. Definitions.

Sec. 4. Application of Act.

Sec. 5. Punitive damages limitations.

Sec. 6. Proportionate liability.

Sec. 7. Pre-litigation notice.

Sec. 8. Pleading requirements.

Sec. 9. Duty to mitigate.

Sec. 10. Application of existing impossibility or commercial impracticability doctrines.

Sec. 11. Damages limitation by contract.

Sec. 12. Damages in tort claims.

Sec. 13. State of mind; bystander liability; control.

Sec. 14. Liability of officers, directors, and employees.

Sec. 15. Appointment of special masters or magistrate judges for Y2K actions.

Sec. 16. Y2K actions as class actions.

## SEC. 2. FINDINGS AND PURPOSES.

(a) Findings.\_ The Congress finds that:

(1)(A) Many information technology systems, devices, and programs are not capable of recognizing certain dates in 1999 and after December 31, 1999, and will read dates in the year 2000 and thereafter as if those dates represent the year 1900 or thereafter or will fail to process dates after December 31, 1999.

(B) If not corrected, the problem described in subparagraph (A) and resulting failures could incapacitate systems that are essential to the functioning of markets, commerce, consumer products, utilities, Government, and safety and defense systems, in the United States and throughout the world.

(2) It is in the national interest that producers and users of technology products concentrate their attention and resources in the time remaining before January 1, 2000, on assessing, fixing, testing, and developing contingency plans to address any and all outstanding year 2000 computer date-change problems, so as to minimize possible disruptions associated with computer failures.

(3)(A) Because year 2000 computer date-change problems may affect virtually all businesses and other users of technology products to some degree, there is a substantial likelihood that actual or potential year 2000 failures will prompt a significant volume of litigation, much of it insubstantial.

(B) The litigation described in subparagraph (A) would have a range of undesirable

effects, including the following:

(i) It would threaten to waste technical and financial resources that are better devoted to curing year 2000 computer date-change problems and ensuring that systems remain or become operational.

(ii) It could threaten the network of valued and trusted business and customer relationships that are important to the effective functioning of the national economy.

(iii) It would strain the Nation's legal system, causing particular problems for the small businesses and individuals who already find that system inaccessible because of its complexity and expense.

(iv) The delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation of business disputes could exacerbate the difficulties associated with the date change and work against the successful resolution of those difficulties.

(4) It is appropriate for the Congress to enact legislation to assure that Y2K problems do not unnecessarily disrupt interstate commerce or create unnecessary caseloads in Federal courts and to provide initiatives to help businesses prepare and be in a position to withstand the potentially devastating economic impact of Y2K.

(5) Resorting to the legal system for resolution of Y2K problems is not feasible for many businesses and individuals who already find the legal system inaccessible, particularly small businesses and individuals who already find the legal system inaccessible, because of its complexity and expense.

(6) The delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation of business disputes can only exacerbate the difficulties associated with the Y2K date change, and work against the successful resolution of those difficulties.

(7) Concern about the potential for liability\_in particular, concern about the substantial litigation expense associated with defending against even the most insubstantial lawsuits\_is prompting many persons and businesses with technical expertise to avoid projects aimed at curing year 2000 computer date-change problems.

(8) A proliferation of frivolous Y2K lawsuits by opportunistic parties may further limit access to courts by straining the resources of the legal system and depriving deserving parties of their legitimate rights to relief.

(9) Congress encourages businesses to approach their Y2K disputes responsibly, and to avoid unnecessary, time-consuming and costly litigation about Y2K failures, particularly those that are not material. Congress supports good faith negotiations

between parties when there is a dispute over a Y2K problem, and, if necessary, urges the parties to enter into voluntary, non-binding mediation rather than litigation.

(b) Purposes.\_ Based upon the power of the Congress under Article I, Section 8, Clause 3 of the Constitution of the United States, the purposes of this Act are\_

(1) to establish uniform legal standards that give all businesses and users of technology products reasonable incentives to solve Y2K computer date-change problems before they develop;

(2) to encourage continued Y2K remediation and testing efforts by providers, suppliers, customers, and other contracting partners;

(3) to encourage private and public parties alike to resolve Y2K disputes by alternative dispute mechanisms in order to avoid costly and time-consuming litigation, to initiate those mechanisms as early as possible, and to encourage the prompt identification and correction of Y2K problems; and

(4) to lessen the burdens on interstate commerce by discouraging insubstantial lawsuits while preserving the ability of individuals and businesses that have suffered real injury to obtain complete relief.

### SEC. 3. DEFINITIONS.

In this Act:

(1) Y 2 K action.\_ The term ``Y2K action" \_

(A) means a civil action commenced in any Federal or State court, or an agency board of contract appeal proceeding, in which the plaintiff's alleged harm or injury resulted directly or indirectly from an actual or potential Y2K failure, or a claim or defense is related directly or indirectly to an actual or potential Y2K failure;

(B) includes a civil action commenced in any Federal or State court by a governmental entity when acting in a commercial or contracting capacity; but

(C) does not include an action brought by a governmental entity acting in a regulatory, supervisory, or enforcement capacity.

(2) Y 2 K failure.\_ The term ``Y2K failure" means failure by any device or system (including any computer system and any microchip or integrated circuit embedded in another device or product), or any software, firmware, or other set or collection of processing instructions to process, to calculate, to compare, to sequence, to display, to

store, to transmit, or to receive year-2000 date-related data, including failures\_\_

(A) to deal with or account for transitions or comparisons from, into, and between the years 1999 and 2000 accurately;

(B) to recognize or accurately to process any specific date in 1999, 2000, or 2001; or

(C) accurately to account for the year 2000's status as a leap year, including recognition and processing of the correct date on February 29, 2000.

(3) Government entity.\_\_ The term ``government entity" means an agency, instrumentality, or other entity of Federal, State, or local government (including multijurisdictional agencies, instrumentalities, and entities).

(4) Material defect.\_\_ The term ``material defect" means a defect in any item, whether tangible or intangible, or in the provision of a service, that substantially prevents the item or service from operating or functioning as designed or according to its specifications. The term ``material defect" does not include a defect that\_\_

(A) has an insignificant or de minimis effect on the operation or functioning of an item or computer program;

(B) affects only a component of an item or program that, as a whole, substantially operates or functions as designed; or

(C) has an insignificant or de minimis effect on the efficacy of the service provided.

(5) Personal injury.\_\_ The term ``personal injury" means physical injury to a natural person, including\_\_

(A) death as a result of a physical injury; and

(B) mental suffering, emotional distress, or similar injuries suffered by that person in connection with a physical injury.

(6) State.\_\_ The term ``State" means any State of the United States, the District of Columbia, Commonwealth of Puerto Rico, the Northern Mariana Islands, the United States Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States, and any political subdivision thereof.

(7) Contract.\_\_ The term ``contract" means a contract, tariff, license, or warranty.

(8) Alternative dispute resolution.\_\_ The term ``alternative dispute resolution" means any process or proceeding, other than adjudication by a court or in an administrative proceeding, to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration.

#### SEC. 4. APPLICATION OF ACT.

(a) General Rule.\_ This Act applies to any Y2K action brought in a State or Federal court after February 22, 1999, for a Y2K failure occurring before January 1, 2003, including any appeal, remand, stay, or other judicial, administrative, or alternative dispute resolution proceeding in such an action.

(b) No New Cause of Action Created.\_ Nothing in this Act creates a new cause of action, and, except as otherwise explicitly provided in this Act, nothing in this Act expands any liability otherwise imposed or limits any defense otherwise available under Federal or State law.

(c) Claims for Personal Injury or Wrongful Death Excluded.\_ This Act does not apply to a claim for personal injury or for wrongful death.

(d) Contract Preservation.\_

(1) In general.\_ Subject to paragraph (2), in any Y2K action any written contractual term, including a limitation or an exclusion of liability, or a disclaimer of warranty, shall be strictly enforced unless the enforcement of that term would manifestly and directly contravene applicable State law embodied in any statute in effect on January 1, 1999, specifically addressing that term.

(2) Interpretation of contract.\_ In any Y2K action in which a contract to which paragraph (1) applies is silent as to a particular issue, the interpretation of the contract as to that issue shall be determined by applicable law in effect at the time the contract was executed.

(e) Preemption of State Law.\_ This Act supersedes State law to the extent that it establishes a rule of law applicable to a Y2K action that is inconsistent with State law, but nothing in this Act implicates, alters, or diminishes the ability of a State to defend itself against any claim on the basis of sovereign immunity.

#### SEC. 5. PUNITIVE DAMAGES LIMITATIONS.

(a) In General.\_ In any Y2K action in which punitive damages are permitted by applicable law, the defendant shall not be liable for punitive damages unless the plaintiff proves by clear and convincing evidence that the applicable standard for awarding damages has been met.

(b) Caps on Punitive damages.\_

(1) In general.\_ Subject to the evidentiary standard established by subsection (a), punitive damages permitted under applicable law against a defendant in such a Y2K action may not exceed the larger of\_

(A) 3 times the amount awarded for compensatory damages; or

(B) \$250,000.

(2) Special rule.\_ In the case of a defendant\_

(A) who\_

(i) is sued in his or her capacity as a individual; and

(ii) whose net worth does not exceed \$500,000; or

(B) that is an unincorporated business, a partnership, corporation, association, unit of local government, or organization with fewer than 25 full-time employees,

paragraph (1) shall be applied by substituting ``smaller" for ``larger".

(3) No Cap If Injury Specifically Intended.\_ Neither paragraph (1) nor paragraph (2) applies if the plaintiff establishes by clear and convincing evidence that the defendant acted with specific intent to injure the plaintiff.

(c) Government entities.\_ Punitive damages in a Y2K action may not be awarded against a government entity.

## SEC. 6. PROPORTIONATE LIABILITY.

(a) In General.\_ Except as provided in subsections (b) and (c), a person against whom a final judgment is entered in a Y2K action shall be liable solely for the portion of the judgment that corresponds to the relative and proportional responsibility of that person. In determining the percentage of responsibility of any defendant, the trier of fact shall determine that percentage as a percentage of the total fault of all persons, including the plaintiff, who caused or contributed to the total loss incurred by the plaintiff.

(b) Proportionate Liability.\_

(1) Determination of responsibility.\_ In any Y2K action, the court shall instruct the jury to answer special interrogatories, or, if there is no jury, the court shall make findings with respect to each defendant, including defendants who have entered into settlements with the plaintiff or plaintiffs, concerning\_

(A) the percentage of responsibility, if any, of each defendant, measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by the plaintiff; and

(B) if alleged by the plaintiff, whether the defendant\_

(i) acted with specific intent to injure the plaintiff; or

(ii) knowingly committed fraud.

(2) Contents of special interrogatories or findings.\_ The responses to interrogatories or findings under paragraph (1) shall specify the total amount of damages that the plaintiff is entitled to recover and the percentage of responsibility of each defendant found to have caused or contributed to the loss incurred by the plaintiff.

(3) Factors for consideration.\_ In determining the percentage of responsibility under this subsection, the trier of fact shall consider\_

(A) the nature of the conduct of each person found to have caused or contributed to the loss incurred by the plaintiff; and

(B) the nature and extent of the causal relationship between the conduct of each such person and the damages incurred by the plaintiff.

(c) Joint Liability for Specific Intent or Fraud.\_

(1) In general.\_ Notwithstanding subsection (a), the liability of a defendant in a Y2K action is joint and several if the trier of fact specifically determines that the defendant\_

(A) acted with specific intent to injure the plaintiff; or

(B) knowingly committed fraud.

(2) Fraud; recklessness.\_

(A) Knowing commission of fraud described.\_ For purposes of subsection (b)(1)(B)(ii) and paragraph (1)(B) of this subsection, a defendant knowingly committed fraud if the defendant\_

(i) made an untrue statement of a material fact, with actual knowledge that the statement was false;

(ii) omitted a fact necessary to make the statement not be misleading, with actual knowledge that, as a result of the omission, the statement was false; and



(iii) knew that the plaintiff was reasonably likely to rely on the false statement.

(B) Recklessness.\_ For purposes of subsection (b)(1)(B) and paragraph (1) of this subsection, reckless conduct by the defendant does not constitute either a specific intent to injure, or the knowing commission of fraud, by the defendant.

(3) Right to contribution not affected.\_ Nothing in this section affects the right, under any other law, of a defendant to contribution with respect to another defendant found under subsection (b)(1)(B), or determined under paragraph (1)(B) of this subsection, to have acted with specific intent to injure the plaintiff or to have knowingly committed fraud.

(d) Special Rules.\_

(1) Uncollectible share.\_

(A) In general.\_ Notwithstanding subsection (a), if, upon motion made not later than 6 months after a final judgment is entered in any Y2K action, the court determines that all or part of the share of the judgment against a defendant for compensatory damages is not collectible against that defendant, then each other defendant in the action is liable for the uncollectible share as follows:

(i) Percentage of net worth.\_ The other defendants are jointly and severally liable for the uncollectible share if the plaintiff establishes that\_

(I) the plaintiff is an individual whose recoverable damages under the final judgment are equal to more than 10 percent of the net worth of the plaintiff; and

(II) the net worth of the plaintiff is less than \$200,000.

(ii) Other plaintiffs.\_ For a plaintiff not described in clause (i), each of the other defendants is liable for the uncollectible share in proportion to the percentage of responsibility of that defendant, except that the total liability of a defendant under this clause may not exceed 50 percent of the proportionate share of that defendant, as determined under subsection (b)(2).

(B) Overall limit.\_ The total payments required under subparagraph (A) from all defendants may not exceed the amount of the uncollectible share.

(C) Subject to contribution.\_ A defendant against whom judgment is not collectible is subject to contribution and to any continuing liability to the plaintiff on the judgment.

(2) Special Right of contribution.\_ To the extent that a defendant is required to make an additional payment under paragraph (1), that defendant may recover contribution\_

(A) from the defendant originally liable to make the payment;

(B) from any other defendant that is jointly and severally liable;

(C) from any other defendant held proportionately liable who is liable to make the same payment and has paid less than that other defendant's proportionate share of that payment; or

(D) from any other person responsible for the conduct giving rise to the payment that would have been liable to make the same payment.

(3) Nondisclosure to jury.\_ The standard for allocation of damages under subsection (a) and subsection (b)(1), and the procedure for reallocation of uncollectible shares under paragraph (1) of this subsection, shall not be disclosed to members of the jury.

(e) Settlement Discharge.\_

(1) In General.\_ A defendant who settles a Y2K action at any time before final verdict or judgment shall be discharged from all claims for contribution brought by other persons. Upon entry of the settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations to the plaintiff of the settling defendant arising out of the action. The order shall bar all future claims for contribution arising out of the action\_

(A) by any person against the settling defendant; and

(B) by the settling defendant against any person other than a person whose liability has been extinguished by the settlement of the settling defendant.

(2) Reduction.\_ If a defendant enters into a settlement with the plaintiff before the final verdict or judgment, the verdict or judgment shall be reduced by the greater of\_

(A) an amount that corresponds to the percentage of responsibility of that defendant; or

(B) the amount paid to the plaintiff by that defendant.

(f) General Right of Contribution.\_

(1) In general.\_ A defendant who is jointly and severally liable for damages in any Y2K action may recover contribution from any other person who, if joined in the original action, would have been liable for the same damages. A claim for contribution shall be determined based on the percentage of responsibility of the claimant and of each person against whom a claim for contribution is made.

(2) Statute of limitations for contribution.\_ An action for contribution in connection with

a Y2K action shall be brought not later than 6 months after the entry of a final, nonappealable judgment in the Y2K action, except than an action for contribution brought by a defendant who was required to make an additional payment under subsection (d)(1) may be brought not later than 6 months after the date on which such payment was made.

(g) More Protective State Law Not Pre-empted.\_ Nothing in this section pre-empts or supersedes any provision of State statutory law that\_

(1) limits the liability of a defendant in a Y2K action to a lesser amount than the amount determined under this section; or

(2) otherwise affords a greater degree of protection from joint or several liability than is afforded by this section.

## SEC. 7. PRE-LITIGATION NOTICE.

(a) In General.\_ Before commencing a Y2K action, except an action that seeks only injunctive relief, a prospective plaintiff with a Y2K claim shall send a written notice by certified mail to each prospective defendant in that action. The notice shall provide specific and detailed information about\_

(1) the manifestations of any material defect alleged to have caused harm or loss;

(2) the harm or loss allegedly suffered by the prospective plaintiff;

(3) how the prospective plaintiff would like the prospective defendant to remedy the problem;

(4) the basis upon which the prospective plaintiff seeks that remedy; and

(5) the name, title, address, and telephone number of any individual who has authority to negotiate a resolution of the dispute on behalf of the prospective plaintiff.

(b) Person to Whom Notice To Be Sent.\_ The notice required by subsection (a) shall be sent\_

(1) to the registered agent of the prospective defendant for service of legal process;

(2) if the prospective defendant does not have a registered agent, then to the chief executive officer of a corporation, the managing partner of a partnership, the proprietor of a sole proprietorship, or to a similarly-situated person for any other enterprise; or

(3) if the prospective defendant has designated a person to receive pre-litigation notices on a Year 2000 Internet Website (as defined in section 3(7) of the Year 2000 Information and Readiness Disclosure Act), to the designated person, if the prospective plaintiff has reasonable access to the Internet.

(c) Response to Notice.\_

(1) In general.\_ Within 30 days after receipt of the notice specified in subsection (a), each prospective defendant shall send by certified mail with return receipt requested to each prospective plaintiff a written statement acknowledging receipt of the notice, and describing the actions it has taken or will take to address the problem identified by the prospective plaintiff.

(2) Willingness to engage in ADR.\_ The written statement shall state whether the prospective defendant is willing to engage in alternative dispute resolution.

(3) Inadmissability.\_ A written statement required by this paragraph is not admissible in evidence, under Rule 408 of the Federal Rules of Evidence or any analogous rule of evidence in any State, in any proceeding to prove liability for, or the invalidity of, a claim or its amount, or otherwise as evidence of conduct or statements made in compromise negotiations.

(4) Presumptive time of receipt.\_ For purposes of paragraph (1), a notice under subsection (a) is presumed to be received 7 days after it was sent.

(d) Failure to Respond.\_ If a prospective defendant\_

(1) fails to respond to a notice provided pursuant to subsection (a) within the 30 days specified in subsection (c)(1); or

(2) does not describe the action, if any, the prospective defendant has taken, or will take, to address the problem identified by the prospective plaintiff,

the prospective plaintiff may immediately commence a legal action against that prospective defendant.

(e) Remediation Period.\_

(1) In general.\_ If the prospective defendant responds and proposes remedial action it will take, or offers to engage in alternative dispute resolution, then the prospective plaintiff shall allow the prospective defendant an additional 60 days from the end of the 30-day notice period to complete the proposed remedial action before commencing a legal action against that prospective defendant.

(2) Extension by agreement.\_ The prospective plaintiff and prospective defendant may

change the length of the 60-day remediation period by written agreement.

(3) Multiple extensions not allowed.\_ Except as provided in paragraph (2), a defendant in a Y2K action is entitled to no more than one 30-day period and one 60-day remediation period under paragraph (1).

(4) Statutes of limitation, etc., tolled.\_ Any applicable statute of limitations or doctrine of laches in a Y2K action to which paragraph (1) applies shall be tolled during the notice and remediation period under that paragraph.

(f) Failure to Provide Notice.\_ If a defendant determines that a plaintiff has filed a Y2K action without providing the notice specified in subsection (a) or without awaiting the expiration of the appropriate waiting period specified in subsection (c), the defendant may treat the plaintiff's complaint as such a notice by so informing the court and the plaintiff. If any defendant elects to treat the complaint as such a notice\_

(1) the court shall stay all discovery and all other proceedings in the action for the appropriate period after filing of the complaint; and

(2) the time for filing answers and all other pleadings shall be tolled during the appropriate period.

(g) Effect of Contractual or Statutory Waiting Periods.\_ In cases in which a contract, or a statute enacted before January 1, 1999, requires notice of nonperformance and provides for a period of delay prior to the initiation of suit for breach or repudiation of contract, the period of delay provided by contract or the statute is controlling over the waiting period specified in subsections (c) and (d).

(h) State Law Controls Alternative Methods.\_ Nothing in this section supersedes or otherwise preempts any State law or rule of civil procedure with respect to the use of alternative dispute resolution for Y2K actions.

(i) Provisional Remedies Unaffected.\_ Nothing in this section interferes with the right of a litigant to provisional remedies otherwise available under Rule 65 of the Federal Rules of Civil Procedure or any State rule of civil procedure providing extraordinary or provisional remedies in any civil action in which the underlying complaint seeks both injunctive and monetary relief.

(j) Special Rule for Class Actions.\_ For the purpose of applying this section to a Y2K action that is maintained as a class action in Federal or State court, the requirements of the preceding subsections of this section apply only to named plaintiffs in the class action.

## SEC. 8. PLEADING REQUIREMENTS.

(a) Application with Rules of Civil Procedure.\_ This section applies exclusively to Y2K actions and, except to the extent that this section requires additional information to be contained in or attached to pleadings, nothing in this section is intended to amend or otherwise supersede applicable rules of Federal or State civil procedure.

(b) Nature and Amount of Damages.\_ In all Y2K actions in which damages are requested, there shall be filed with the complaint a statement of specific information as to the nature and amount of each element of damages and the factual basis for the damages calculation.

(c) Material Defects.\_ In any Y2K action in which the plaintiff alleges that there is a material defect in a product or service, there shall be filed with the complaint a statement of specific information regarding the manifestations of the material defects and the facts supporting a conclusion that the defects are material.

(d) Required State of Mind.\_ In any Y2K action in which a claim is asserted on which the plaintiff may prevail only on proof that the defendant acted with a particular state of mind, there shall be filed with the complaint, with respect to each element of that claim, a statement of the facts giving rise to a strong inference that the defendant acted with the required state of mind.

## SEC. 9. DUTY TO MITIGATE.

Damages awarded in any Y2K action shall exclude compensation for damages the plaintiff could reasonably have avoided in light of any disclosure or other information of which the plaintiff was, or reasonably should have been, aware, including information made available by the defendant to purchasers or users of the defendant's product or services concerning means of remedying or avoiding the Y2K failure.

## SEC. 10. APPLICATION OF EXISTING IMPOSSIBILITY OR COMMERCIAL IMPRACTICABILITY DOCTRINES.

In any Y2K action for breach or repudiation of contract, the applicability of the doctrines of impossibility and commercial impracticability shall be determined by the law in existence on January 1, 1999. Nothing in this Act shall be construed as limiting or impairing a party's right to assert defenses based upon such doctrines.

## SEC. 11. DAMAGES LIMITATION BY CONTRACT.

In any Y2K action for breach or repudiation of contract, no party may claim, nor be awarded, any category of damages unless such damages are allowed\_

(1) by the express terms of the contract; or

(2) if the contract is silent on such damages, by operation of State law at the time the contract was effective or by operation of Federal law.

## SEC. 12. DAMAGES IN TORT CLAIMS.

(a) In General.\_ A party to a Y2K action making a tort claim may not recover damages for economic loss unless\_

(1) the recovery of such losses is provided for in a contract to which the party seeking to recover such losses is a party; or

(2) such losses result directly from damage to tangible personal or real property caused by the Y2K failure (other than damage to property that is the subject of the contract between the parties to the Y2K action or, in the event there is no contract between the parties, other than damage caused only to the property that experienced the Y2K failure),

and such damages are permitted under applicable Federal or State law.

(b) Economic Loss.\_ For purposes of this section only, and except as otherwise specifically provided in a valid and enforceable written contract between the plaintiff and the defendant in a Y2K action, the term ``economic loss"\_

(1) means amounts awarded to compensate an injured party for any loss other than losses described in subsection (a)(2); and

(2) includes amounts awarded for damages such as\_

(A) lost profits or sales;

(B) business interruption;

(C) losses indirectly suffered as a result of the defendant's wrongful act or omission;

(D) losses that arise because of the claims of third parties;

(E) losses that must be plead as special damages; and

(F) consequential damages (as defined in the Uniform Commercial Code or analogous State commercial law).

(c) Certain Actions Excluded.\_ This section does not affect, abrogate, amend, or alter any patent, copyright, trade-secret, trademark, or service-mark action, or any claim for defamation or invasion of privacy under Federal or State law.

(d) Certain Other Actions.\_ A person liable for damages, whether by settlement or

judgment, in a civil action to which this Act does not apply because of section 4(c) whose liability, in whole or in part, is the result of a Y2K failure may, notwithstanding any other provision of this Act, pursue any remedy otherwise available under Federal or State law against the person responsible for that Y2K failure to the extent of recovering the amount of those damages.

#### SEC. 13. STATE OF MIND; BYSTANDER LIABILITY; CONTROL.

(a) Defendant's State of Mind.\_ In a Y2K action other than a claim for breach or repudiation of contract, and in which the defendant's actual or constructive awareness of an actual or potential Y2K failure is an element of the claim, the defendant is not liable unless the plaintiff establishes that element of the claim by clear and convincing evidence.

(b) Limitation on Bystander Liability for Y2K Failures.\_

(1) In general.\_ With respect to any Y2K action for money damages in which\_

(A) the defendant is not the manufacturer, seller, or distributor of a product, or the provider of a service, that suffers or causes the Y2K failure at issue;

(B) the plaintiff is not in substantial privity with the defendant; and

(C) the defendant's actual or constructive awareness of an actual or potential Y2K failure is an element of the claim under applicable law,

the defendant shall not be liable unless the plaintiff, in addition to establishing all other requisite elements of the claim, proves, by clear and convincing evidence, that the defendant actually knew, or recklessly disregarded a known and substantial risk, that such failure would occur.

(2) Substantial privity.\_ For purposes of paragraph (1)(B), a plaintiff and a defendant are in substantial privity when, in a Y2K action arising out of the performance of professional services, the plaintiff and the defendant either have contractual relations with one another or the plaintiff is a person who, prior to the defendant's performance of such services, was specifically identified to and acknowledged by the defendant as a person for whose special benefit the services were being performed.

(3) Certain claims excluded.\_ For purposes of paragraph (1)(C), claims in which the defendant's actual or constructive awareness of an actual or potential Y2K failure is an element of the claim under applicable law do not include claims for negligence but do include claims such as fraud, constructive fraud, breach of fiduciary duty, negligent misrepresentation, and interference with contract or economic advantage.



(c) Control Not Determinative of Liability.\_ The fact that a Y2K failure occurred in an entity, facility, system, product, or component that was sold, leased, rented, or otherwise within the control of the party against whom a claim is asserted in a Y2K action shall not constitute the sole basis for recovery of damages in that action. A claim in a Y2K action for breach or repudiation of contract for such a failure is governed by the terms of the contract.

#### SEC. 14. LIABILITY OF OFFICERS, DIRECTORS, AND EMPLOYEES.

(a) In General.\_ A director, officer, trustee, or employee of a business or other organization (including a corporation, unincorporated association, partnership, or non-profit organization) is not personally liable in any Y2K action in that person's capacity as a director, officer, trustee, or employee of the business or organization for more than the greater of\_

(1) \$100,000; or

(2) the amount of pre-tax compensation received by the director, officer, trustee, or employee from the business or organization during the 12 months immediately preceding the act or omission for which liability is imposed.

(b) Exception.\_ Subsection (a) does not apply in any Y2K action in which it is found by clear and convincing evidence that the director, officer, trustee, or employee\_

(1) made statements intended to be misleading regarding any actual or potential year 2000 problem; or

(2) withheld from the public significant information there was a legal duty to disclose regarding any actual or potential year 2000 problem of that business or organization which would likely result in actionable Y2K failure.

(c) State law, charter, or bylaws.\_ Nothing in this section supersedes any provision of State law, charter, or a bylaw authorized by State law in existence on January 1, 1999, that establishes lower financial limits on the liability of a director, officer, trustee, or employee of such a business or organization.

#### SEC. 15. APPOINTMENT OF SPECIAL MASTERS OR MAGISTRATE JUDGES FOR Y2K ACTIONS.

Any District Court of the United States in which a Y2K action is pending may appoint a special master or a magistrate judge to hear the matter and to make findings of fact and conclusions of law in accordance with Rule 53 of the Federal Rules of Civil Procedure.

#### SEC. 16. Y2K ACTIONS AS CLASS ACTIONS.

(a) Material Defect Requirement.\_ A Y2K action involving a claim that a product or

service is defective may be maintained as a class action in Federal or State court as to that claim only if\_

(1) it satisfies all other prerequisites established by applicable Federal or State law, including applicable rules of civil procedure; and

(2) the court finds that the defect in a product or service as alleged would be a material defect for the majority of the members of the class.

(b) Notification.\_ In any Y2K action that is maintained as a class action, the court, in addition to any other notice required by applicable Federal or State law, shall direct notice of the action to each member of the class, which shall include\_

(1) a concise and clear description of the nature of the action;

(2) the jurisdiction where the case is pending; and

(3) the fee arrangements with class counsel, including the hourly fee being charged, or, if it is a contingency fee, the percentage of the final award which will be paid, including an estimate of the total amount that would be paid if the requested damages were to be granted.

(c) Forum for Y2K Class Actions.\_

(1) Jurisdiction.\_ Except as provided in paragraph (2), a Y2K action may be brought as a class action in a United States District Court or removed to a United States District Court if the amount in controversy is greater than the sum or value of \$1,000,000 (exclusive of interest and costs), computed on the basis of all claims to be determined in the action.

(2) Exception.\_ A Y2K action may not be brought or removed as a class action under this section if\_

(A)(i) a substantial majority of the members of the proposed plaintiff class are citizens of a single State;

(ii) the primary defendants are citizens of that State; and

(iii) the claims asserted will be governed primarily by the law of that State; or

(B) the primary defendants are States, State officials, or other governmental entities against whom the United States District Court may be foreclosed from ordering relief.

(d) Effect on Rules of Civil Procedure.\_ Except as otherwise provided in this section, nothing in this section supersedes any rule of Federal or State civil procedure

applicable to class actions.

Amend the title so as to read: An Act to regulate commerce between and among the several States by providing for the orderly resolution of disputes arising out of computer-based problems related to processing data that includes a 2-digit expression of the year's date through fostering an incentive for businesses to continue fixing and testing their systems, to communicate with other businesses, resolve year-2000 business disputes without litigation, and to settle year 2000 lawsuits that may disrupt significant sectors of the American economy.

